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8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**

10 TU AHN TRAN, ) Case No. SA CV 09-1430 ODW (JCG)  
11 )  
12 Petitioner, )  
13 v. ) **ORDER ADOPTING REPORT AND**  
14 JAMES WALKER, Warden, ) **RECOMMENDATION OF UNITED**  
15 Respondent. ) **STATES MAGISTRATE JUDGE AND**  
16 ) **DENYING CERTIFICATE OF**  
17 ) **APPEALABILITY**  
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18 Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the  
19 Magistrate Judge's Report and Recommendation, Petitioner's Objections to the  
20 Report and Recommendation, and the remaining record.

21 Petitioner's Objections essentially rehash the arguments in the Petition and  
22 Traverse. Additionally, Petitioner contends that the state court's denial of his jury  
23 instruction claim was on state law grounds and, therefore, is not entitled to  
24 deference under 28 U.S.C. § 2254(d). Petitioner is incorrect. The state court  
25 expressly considered Petitioner's federal constitutional challenge to the instruction  
26 and denied the claim on the merits. (*See* Objs., Ex. 1 at 25.) In any event,  
27 Petitioner's claim does not warrant habeas relief even under *de novo* review  
28 because the jury instruction did not violate Petitioner's constitutional rights for the

1 reasons stated in the Report and Recommendation; the instruction benefitted  
2 Petitioner and did not relieve the prosecution of its burden of proof on any of the  
3 elements of the charged crimes. *See Sandstrom v. Montana*. 442 U.S. 510, 520  
4 (1979) (constitutional validity of presumption in jury instruction depends on  
5 whether it had the effect of relieving the prosecution of its burden of proving the  
6 facts necessary to constitute the crime charged).

7 Accordingly, having made a de novo determination of those portions of the  
8 Report and Recommendation and any proposed findings or recommendations to  
9 which objection is made, IT IS ORDERED THAT:

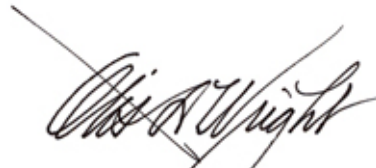
10 (1) the Report and Recommendation is approved and adopted;

11 (2) judgment be entered denying the Petition and dismissing this action with  
12 prejudice; and

13 (3) the Clerk serve copies of this Order and the Judgment on the parties.

14 Additionally, for the reasons stated in the Report and Recommendation, the  
15 Court finds that Petitioner has not made a substantial showing of the denial of a  
16 constitutional right. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b); *Miller-El v.*  
17 *Cockrell*, 537 U.S. 322, 336 (2003). Thus, the Court declines to issue a certificate  
18 of appealability.

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20 DATED: May 12, 2011



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HON. OTIS D. WRIGHT II  
UNITED STATES DISTRICT JUDGE